Enche Mooney has raised, but not very strenuously, the question of his client's remedy under section 23 of the Ordinance. I do not really think that section is altogether intended to be applied in a case like this and think the appellant can well be left to take such other proceedings as he may consider desirable.

Hill and **Good JJ.A.** concurred.

Appeal allowed.

Solicitors: *Bannon & Bailey; Braddell & Ramani.*

SATHAPPAN v. LIM CHOOI HOCK & ANOR.

[O. C. J. (Ong J.) August 27, 1962]

[K.L. — Civil Suit No. 352 of 1961]

Debtor — Judgment debtor — Application for committal — Payment by instalments — Principles on which the order for committal should or should not be made — Debtors Ordinance, 1957, s.4(3), (7), (9).

The judgment creditor applied under section 4(7), Debtors Ordinance, 1957, for the judgment debtors to show cause why they should not be committed to prison for having wilfully neglected to comply with an order of court made on April 9, 1962 by failing to pay two instalments of $100 each due on May 1 and June 1, 1962.

The judgment debtors are husband and wife who earn their living by making cakes which are sold in the streets by itinerant Tamil hawkers who keep 30 to 40% of the day's takings as their remuneration or commission. The debtors bear the risk of cakes being unsold at the end of the day when the remainder would be returned to them. Such cakes would not be saleable the next day. The above evidence of their occupation was given by the debtors themselves at the hearing of a judgment debtor summons on April 9, 1962, when they said that the husband made an average of $2 to $3 profit per day, just enough for their own living expenses. The wife helped the husband in domestic chores and in the cake-making. The judgment creditor, without giving any evidence himself, or calling any witnesses under section 4(3) of the Ordinance, to establish the means of the debtors, asked for an order against them for payment of $700 per month. An order was then made that the debtors should pay $100 per month with effect from May 1, 1962.

On an application for their committal to prison for non-payment of two instalments,

Held: the evidence of the judgment creditor and the evidence called by him to supply information respecting the debtors' ability to pay fell far short of the requirements specified in section 4(9) and the application should be dismissed.

Principles set out in *In re A Judgment Debtor (No. 23 of 1934)* (1) followed.

Case referred to:—

(1) *In re A Judgment Debtor (No. 23 of 1934)* [1935] W.N. 128.

CIVIL SUIT.

V. Oorjitham for the plaintiff.

Defendants in person.

Cur. Adv. Vult.

Ong J.: The judgment creditor applied under sub-section (7) of section 4 of the Debtors Ordinance, 1957, for the judgment debtors to show cause why they should not be committed to prison for having wilfully neglected to comply with an order of Court made on April 9, 1962 by failing to pay two instalments of $100 each due on May 1 and June 1, 1962.

The judgment debtors are husband and wife who earn their living by making cakes which are sold in the streets by itinerant Tamil hawkers who keep 30 to 40 per cent of the day's takings as their remuneration or commission. The debtors bear the risk of cakes being unsold at the end of the day when the remainder would be returned to them. Such cakes would not be saleable the next day. The above evidence of their occupation was given by the debtors themselves at the hearing of judgment debtor summons on April 9, 1962, when they said that the husband made an average of $2 to $3 profit per day, just enough for their own living expenses. The wife helped the husband in domestic chores and in the cake-making. The judgment creditor, without giving any evidence himself, or calling any witnesses under sub-section (3) of section 4 of the Ordinance, to establish the means of the debtors, asked for an order against them for payment of $700 per month. An order was then made that the debtors should pay $100 per month with effect from May 1, 1962.

An application for their committal to prison for non-payment of two instalments was in due course made before me. Speaking for myself, I was not satisfied, after perusing the evidence taken on the judgment debtor summons, that the debtors had the means then or since to pay $100 per month or anything near that sum. The wife at any rate had certainly no means of her own from any extraneous source of income or gainful employment, and speaking again for myself, I should have been unable to make any order against her. As I had been compelled to take this view on the evidence, I adjourned the application to allow the judgment creditor an opportunity to subpoena such witnesses as he might choose to call for the purpose of supplying information respecting the debtors' ability to pay the monthly instalments. The evidence he has called today in fact corroborated what was said by the debtors themselves as to their means, and it falls very far short of satisfying me, under sub-section (9) of section 4 that since the date of the order directing payment the debtors, or either of them, has had sufficient means to comply with the order. I am bound accordingly to dismiss this application in accordance with the statement of principles set out in *In re A Judgment Debtor (No. 23 of 1934),*(1) where it was said :

"If the debtor makes default in payment of one or more instalments, the judgment creditor may issue a fresh judgment summons. On the hearing of that summons, the court has to consider, as Willes J. held in *Re The Debtors Act,* (1870) 22 L.T. 666, and referred to by Lord Esher M.R. in *Reg.* v. *Judge of Brompton County Court and Reeves,* 18 Q.B.D. 213, 217, whether the debtor has or since the due date of the several instalments has had such means as would have enabled him to obey the order by payment. At this stage the prospects which the debtor may have of paying in the future are not material and cannot be considered. The Act is not in-

tended to enable the court in effect to make a charge on the man's future earnings, nor is it intended to furnish the creditor with a convenient and minatory process of execution; the Act merely gives the court jurisdiction to punish the debtor by committal for failing in the present or in the past to apply available means to meet the instalment or instalments in arrear. His default did not consist in his failure to pay the instalment; his default consisted in his failure to apply in payment of the instalment, means which he had available for the purpose. The section does not aim at punishing poverty or at punishing a man for incurring liabilities recklessly or improvidently, and it ought, of course, not to be used for that purpose: it aims at punishing a dishonest use for other purposes of funds which a man has or has had available towards paying what he has been ordered to pay: see the observations of Lord Halsbury L.C. in *Stoner* v. *Fowle*, 13 App. Cases 20, 24, 28 and those of Lord Bramwell, at p. 28."

In the circumstances of this case, and the judgment creditor having been given the fullest opportunity of justifying his claim to any monthly instalments, the result has been to prove that the named couple have only an income of not quite $100 between them per month for their living expenses. The order of April 9, 1962 ought not to hang over the heads of these debtors and accordingly that order is discharged under section 13 of the Ordinance.

Order discharged.

Solicitors: *Bannon & Bailey.*

CHAN KING YUE v. LEE & WONG

[O. C. J. (Suffian J.) August 30, 1962]

[K.L. — Civil Suit No. 448 of 1960]

Partnership — Loan by wife of one partner — Money loaned handed to husband — Receipt made out in name of partnership — No express or implied authority to partner to borrow — Loan used to pay off debts of the partnership — Liability of partnership under section 204 of the Contracts (Malay States) Ordinance, 1950 — Liability under equitable rules.

The husband of the plaintiff obtained from her the sum of $35,000 as loan from her to the firm of which he was a partner and he gave her a receipt in the name of the partnership. The money was paid into the partnership account and immediately thereafter utilised by the firm to pay off some of its debts.

In an action by the plaintiff to recover the loan, the other partner of the firm contended that the husband had no authority of the firm to borrow the money and it was made to the husband personally to his own use and benefit.

Held: (1) the borrowing was an "act necessary for the carrying on of the business" of the partnership under section 204 of the Contracts (Malay States) Ordinance and as such bound the co-partner;

(2) even apart from the statutory provision in the Contracts (Malay States) Ordinance, the fact that the loan had been utilised for the payment of the debts of the partnership, the lender was entitled in equity to stand in the same position as if the money had originally been borrowed by the partnership. *Bannatyne* v. *D. & C. MacIyer* (2) followed.

Cases referred to:—

(1) *Ram Chandra Sahu* v. *Kasem Khan*, A.I.R. 1925 Cal. 29.

(2) *Bannatyne* v. *D. & C. MacIyer* [1906] 1 K.B. 103.

The following cases were also cited in argument: *Wheatley* v. *Smithers* [1907] 2 K.B. 684; *Higgings* v. *Beauchamp* [1914] 3 K.B. 1192; *Chettinad Bank* v. *Chop Haw Lee & Anor.* [1931-32] F.M.S.L.R. 31; *Chop Cheong Tuck* v. *Chop Tack Loong & Ors.* [1934] M.L.J. 176.

CIVIL SUIT.

Ng Kok Thoy for the plaintiff.

Y. S. Lee for the defendant firm.

L. E. Osman for H. M. Lee.

Cur. Adv. Vult.

Suffian J.: The sole question for decision here is whether the defendant firm is liable to repay the plaintiff $35,000 which it is proved was given by her to her husband Mr. H. M. Lee, a partner of the firm, on 26th November, 1955, and which it is admitted was the same day put into the firm's bank account and was within the next few days used to pay the firm's creditors. Mr. Wong, the other partner, contends that the firm is not liable because—

(a) the loan if made was made to Mr. Lee personally,

(b) Mr. Lee had no authority to borrow for the firm and

(c) the money was borrowed by Mr. Lee on his own account and for his own use and benefit and not in the usual course of the firm's business.

In November 1955 Mr. Lee told his wife the plaintiff that he had been asked by his partner to find a loan for the firm and Mr. Lee obtained $35,000 from her. This was on 26th November, 1955. He wrote out and signed a receipt for this money, P.1. This receipt, No. 151, read as follows :—

"

No. 151

Lee and Wong,
Chan Wing Building,
Kuala Lumpur.

Date 26th November, 1955.

Received from Madam Chan King Yue [Mrs. Lee's name] the sum of Dollars thirty-five thousand, being short term loan with interest.

(Signed) Lee and Wong,
Engineering Contractors."

$35,000.

Mr. Lee had authority to issue receipts on behalf of the firm.

Mr. Lee did not give evidence, as to which I was not surprised, as the partners had parted company with bad feeling to spare and had Mr. Lee gone into the box, plenty more mud would have been thrown at him. His story as disclosed by cross-examination as well as by his counsel's submission is that he had express, if not implied, authority, from his partner to borrow the $35,000 on behalf of the firm, he borrowed it on behalf of the firm, the firm needed the money and spent it to pay its legal debts.

Now that I think I know the law applicable to this dispute, I should consider this case under three heads :—

(a) Did Mr. Lee have his partner's authority, express or implied, to borrow the